INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Bachrack v. *United States*, 75 F. 2d 824	8
Bain, Ex parte, 121 U.S. 1	8
Beckett v. *Hudspeth*, 131 F. 2d 195	12
Bell v. *United States*, 100 F. 2d 474	7
Burton v. *United States*, 151 F. 2d 17, certiorari denied, 326 U.S. 789	12
Colosacco v. *United States*, 196 F. 2d 165	13
Delaney v. *United States*, 263 U.S. 586	11
Dunbar v. *United States*, 156 U.S. 185	7
Felton v. *United States*, 170 F. 2d 153 (C.A. D.C.), certiorari denied, 335 U.S. 831	12
Fiswick v. *United States*, 329 U.S. 211	9
Graffi v. *United States*, 22 F. 2d 593	7
Hagner v. *United States*, 285 U.S. 427	8
Kann v. *United States*, 323 U.S. 88	10
Krulewitch v. *United States*, 336 U.S. 440	9
Logan v. *United States*, 144 U.S. 263	9
McKinney v. *United States*, 172 F. 2d 781	7
Nye & Nissen v. *United States*, 336 U.S. 613	10
Pinkerton v. *United States*, 328 U.S. 640	13
Price v. *United States*, 165 U.S. 311	8
Rosen v. *United States*, 161 U.S. 29	7
Sealfon v. *United States*, 332 U.S. 575	13
Thomas v. *District of Columbia*, 90 F. 2d 424	12
United States v. *Carll*, 105 U.S. 611	7, 8
United States v. *Crowe*, 188 F. 2d 209	13
United States v. *Johnson*, 319 U.S. 503	11

Statutes and Rules:

18 U.S.C. [1946 ed., Supp. V] 2, 62 Stat. 684	2
18 U.S.C. [1946 ed., Supp. V] 472, 62 Stat. 705	2

Federal Rules of Criminal Procedure:

Rule 7(c)	8
Rule 33	11

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 333

EVERETT EDWARD HACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 148-156) and dissenting (R. 156-157) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 24, 1953 (R. 158) and a petition for rehearing was denied July 16, 1953 (R. 167). On August 12, 1953, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was extended to September 14, 1953. The petition was filed September 10, 1953. The jurisdiction of

this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an indictment, attacked for the first time in this Court, sufficiently charged petitioner with (1) procuring another to pass counterfeit currency with intent to defraud, and (2) a conspiracy to pass such currency.

2. Whether the evidence was sufficient to support petitioner's conviction.

3. Whether petitioner was denied effective assistance of counsel under the Sixth Amendment where his counsel deliberately waived objection to certain hearsay evidence.

4. Whether the substantive and conspiracy counts were for separate offenses for which consecutive sentences could be imposed.

STATUTES INVOLVED

18 U. S. C. [1946 ed., Supp. V] 472, 62 Stat. 705:

> Whoever, with intent to defraud, passes, * * * or attempts to pass, * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U. S. C. [1946 ed., Supp. V] 2, 62 Stat. 684:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

* * * * *

STATEMENT

Petitioner was charged in the United States District Court for the Southern District of Indiana in a two-count indictment, with (1) procuring, along with one Bocock, the passing, with intent to defraud, of a counterfeit $20 note by Ada Miller, in violation of 18 U. S. C. 472; and (2) conspiring with Bocock and Ada Miller to violate 18 U. S. C. 472 by the passing of counterfeit $20 notes (R. 1-2). Petitioner was found guilty on both counts, and given consecutive sentences of imprisonment for five years on count one and three years on count two (R. 134-135). On appeal the judgment was affirmed by the Court of Appeals, one judge dissenting in part (R. 140, 156, 158).

Evidence supporting the conviction may be summarized as follows:

Petitioner, Monroe Hack and Ada Miller, are brothers and sister. Petitioner operated a used car lot in Indianapolis, Indiana, and the other two lived in Louisville, Kentucky. (R. 22, 23.)

On or about December 9, 1951, petitioner, defendant Ada Miller, and another defendant, one Bocock, visited Monroe at the latter's home in Louisville, after which petitioner accompanied Ada and Bocock to Indianapolis (R. 36, 52, 77-78, 96). On December 11, Monroe was directed by Ada Miller in a telephone conversation from Indianapolis to come there the following day. Ada wired him $32 for the trip (R. 22-23, 52-53, 69).

On December 12, Monroe, his wife, and his son Lloyd arrived at petitioner's used car lot. Ada said to Monroe and petitioner, "Well, I will leave

you men alone," and took Monroe's wife and son to a trailer nearby, while petitioner and Monroe remained at the office. (R. 23.) Petitioner immediately began to explain a counterfeit money deal, and showed Monroe about $2,000 in "real mint" counterfeit currency. Monroe remonstrated against petitioner's illegal venture, but to no avail. Petitioner advised, "I'll give you orders what to do," and explained that "he was the head man and that [Monroe] would take orders from him." (R. 23-24, 27, 37.) Petitioner suggested that Monroe go to California as his distributor for the counterfeit currency. Petitioner directed Monroe to return the following morning, and Monroe stated that he would think it over. (R. 24.) Instead of returning to the used car lot, however, Monroe contacted the Indianapolis police, who advised calling United States Secret Service agents to his hotel room. After Monroe had discussed the counterfeit ring and the agents had given him a phone number to call in Louisville, he drove there with his family (R. 26).

On December 15, Ada Miller passed a $20 counterfeit note in an Indianapolis shoe store, this being the offense charged in count one. She left the store in such a hurry that she almost knocked down a woman and some children entering. (R. 6-7, 17.) On the same day she attempted to pass another $20 counterfeit note in an Indianapolis grocery store, but paid for her purchase with a good $5 bill when the clerk began to look with suspicion at the proffered counterfeit note (R. 11-13).

On December 17, Monroe reported to Secret Service agents Geiglein and Fitzgerald in Louisville, who suggested that he phone Indianapolis. In this telephone conversation Monroe, after being informed that Ada Miller was in Detroit, asked petitioner for hospital expense money for Monroe's son, and petitioner stated he would bring the money. (R. 27-28.) The agents told Monroe that all he had to do was "just get some samples" of the counterfeit money. When Monroe learned that Ada was in Louisville, not Detroit, he went to her home where Ada boasted that while in Detroit "she set the town on fire and got out". (R. 28.) Upon Monroe's informing the agents of Ada's presence in Louisville, they repeated that he should proceed to get some samples (R. 29).

Also on December 17, at about 6 p. m., Ada and Bocock drove to Monroe's house in Bocock's Chevrolet with Indiana license plates. While handing Monroe four counterfeit $20 notes, Bocock stated, "Well, I got the money. Let's go out and see where you are; with us or with the law." (R. 30, 48-49, 58.) With Monroe driving his car and Bocock and Ada following him, Monroe made a few purchases of whiskey and passed four $20 counterfeit notes. Monroe gave the whiskey to Ada and the change to Bocock. Bocock then gave Monroe ten more notes to pass. (R. 31, 32, 33.) Monroe finally met agent Geiglein, after having missed him earlier, and showed him the counterfeit notes. Monroe phoned agent Fitzgerald to inquire about what to do with the notes, but was informed that the office

did not open until 8 o'clock the next morning. (R. 34-35, 83, 84.)

On the morning of December 18, Monroe was arrested for having passed the counterfeit notes on the preceding evening, and was kept in jail 11 days before being released (R. 47, 85).

On December 19, Ada Miller gave Lloyd Hack (Monroe's son) a parcel to mail from Louisville. After he had done so, she informed him that he had just mailed about $2,000 in counterfeit currency. The parcel had been addressed by Ada to two persons in Indianapolis, and contained $2,360 in $20 counterfeit notes. (R. 18-19, 53, 55-56.) Shortly thereafter Ada turned herself in to the agents at Louisville (R. 74).

On December 20, petitioner and Bocock were arrested in Indianapolis. A search was made of petitioner's office, but no counterfeit money was found. (R. 20-21.)

Petitioner, testifying in his defense, professed innocence of the charges against him, denied that he discussed a counterfeit money plot with Monroe, and disavowed having any such money in his possession (R. 93, 94, 95, 97, 98). He admitted that he, Ada, and Bocock had met at Monroe's Louisville home around December 9, and stated that he asked Ada to phone Monroe to come to Indianapolis in order to build a garage for him (R. 92, 96).

Defendant Ada Miller, testifying on her own behalf, denied that she passed, or attempted to pass, any counterfeit $20 notes in Indianapolis on December 15 (R. 76, 78-79); denied forcing her brother Monroe to pass counterfeit bills on Decem-

ber 17 (R. 71); and asserted that Monroe told her to mail the parcel, which she, not knowing it contained counterfeit notes, gave to Lloyd to mail for his father (R. 73-74). She admitted that she had met with petitioner, Bocock and Monroe at the latter's Louisville home around December 9 (R. 77-78).

ARGUMENT

1. Although the question was not raised in either of the courts below, petitioner now contends that both counts of the indictment were fatally defective in failing to charge crimes (Pet. 17-19). There is, however, no substance to this contention.

Neither of the two counts specifically alleged that the counterfeit notes were passed with knowledge by the defendants that they were counterfeit. Both counts did, however, charge a passing of counterfeit notes "with intent to defraud", and before trial, with assistance of counsel, the defendants stated that they thoroughly understood "the charges against them" (R. 1, 2, 3). The allegations that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit for without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud. Cf. *McKinney* v. *United States,* 172 F. 2d 781, 783 (C. A. 9); *Bell* v. *United States,* 100 F. 2d 474, 478 (C. A. 5); *Graffi* v. *United States,* 22 F. 2d 593, 594 (C. A. 7).[1]

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[1] The later decisions of this Court have deprived *United States* v. *Carll* 105 U.S. 611 (see Pet. 17) of any vitality. See *Dunbar* v. *United States,* 156 U.S. 185, 191-194; *Rosen* v.

In these circumstances the indictment was a "plain, concise and definite written statement of the essential facts constituting the offense charged" within the meaning of Rule 7(c), F. R. Crim. P. It stated facts sufficient to inform the defendants of the offenses with which they were charged so that they could properly defend themselves, and did this with sufficient certainty to protect them against another prosecution for the same offenses. Cf. *Hagner* v. *United States,* 285 U. S. 427, 431.

It is immaterial that count one did not allege who was to be defrauded, or to whom the note was to be passed. An accused, in a counterfeiting case, does not usually know his intended victim, but is interested primarily in passing the counterfeit to be accepted as genuine. Cf. *Bachrack* v. *United States,* 75 F. 2d 824, 825 (C. A. 5). The name of the victim was a detail of evidence which petitioner could have sought by a bill of particulars if he deemed the information necessary for his defense.[2]

2. Petitioner's contention (Pet. 19-24) that the evidence was insufficient to support his conviction under either the conspiracy or the substantive count is without merit.

(a) As to the conspiracy count, the evidence showed that on December 9, 1951, petitioner, co-

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United States, 161 U. S. 29, 31-33; and *Price* v. *United States,* 165 U.S. 311, 312. *Carll,* moreover, was decided long prior to the advent of Rule 7(c), which was clearly satisfied here.

[2] The amendment of the indictment approximately seven months before trial to change petitioner's name from Edward Everett Hack to Everett Edward Hack (R. 3), was obviously not a substantial change such as was involved in *Ex parte Bain,* 121 U.S. 1. After this amendment, at the time of the arraignment, petitioner stated that he thoroughly understood the charges against him (R. 3).

defendants Ada Miller and Bocock, and Monroe Hack all met at Monroe's home in Louisville. Ada and Bocock returned to Indianapolis with petitioner. On December 11, at the instance of petitioner, Ada, in a long distance telephone conversation with Monroe, directed him to come to petitioner's place of business in Indianapolis the next day, and even wired him $32 expense money for the trip. After Monroe arrived with his family on December 12, petitioner, in an unsuccessful effort to get Monroe to join the conspiracy,[3] showed his $2,000 in "real mint" counterfeit currency, stated that he would give the orders about what to do, and announced that he was the "head man." On December 15, Ada passed a $20 counterfeit note in Indianapolis, and attempted to pass another. Ada then worked in collaboration with Bocock, who gave counterfeit bills to Monroe and supervised his passing of them in Louisville. When it looked as though the game was up, on December 19, Ada engineered the mailing of $2,360 of counterfeit notes to Indianapolis in an attempt to dispose of incriminating evidence.

The foregoing evidence was sufficient for the jury to have found petitioner guilty of participation in the conspiracy alleged. The court below was unanimous in adopting this view (R. 152, 156).

(b) The evidence was also sufficient to prove that

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[3] *Fiswick* v. *United States*, 329 U.S. 211, *Logan* v. *United States*, 144 U.S. 263, and *Krulewitch* v. *United States*, 336 U.S. 440. Cited by petitioner for the proposition that admissions and declarations of a co-conspirator, after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators, are inapposite. Monroe's testimony related to acts and declarations by petitioner himself.

petitioner procured the commission of the offense of passing the $20 counterfeit note by Ada Miller on December 15 under count one of the indictment.[4] Although circumstantial, it was nevertheless adequate to support the jury's finding that petitioner procured the commission of the offense by Ada. Cf. *Nye & Nissen* v. *United States,* 336 U. S. 613, 619.

Petitioner and his sister Ada worked closely in the counterfeiting venture. At petitioner's instance, Ada made a long distance call from Indianapolis to Louisville, summoning Monroe to meet petitioner at Indianapolis, and wired Monroe $32 to make the trip. At the meeting on December 12 in Indianapolis, Ada stated to petitioner and Monroe, "Well, I will leave you men alone." The jury could reasonably infer from this that Ada well knew that petitioner was then going to discuss the proposed counterfeiting deal with Monroe, as he did. Monroe had seen about $2,000 in counterfeit money in petitioner's possession on December 12, and on December 15 Ada passed the $20 counterfeit note involved in count one. This combination of circumstances the jury could reasonably interpret as evidence that petitioner had associated himself with Ada's venture and sought by his action to make it succeed.

Both courts below having found the evidence sufficient to support conviction, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88,

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[4] It was upon this question that Judge Major dissented in the court below (R. 156-157).

93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

3. Nor is there any merit to petitioner's complaint that he was denied effective assistance of counsel under the Sixth Amendment by reason of his counsel's deliberate refusal to object to certain hearsay evidence narrated by Monroe Hack (Pet. 24-26).

This contention was not raised in petitioner's motion for a new trial filed on November 17, within five days after the verdict of guilty on November 13, 1952 (R. 134, 136). On December 11 petitioner employed different counsel, who on December 15 filed a petition for leave to file an amended motion for a new trial to raise this point, but this petition was denied (R. 137-139). As the court below correctly observed (R. 153), this petition did not comply with Rule 33, F. R. Crim. P.,[5] as it was filed out of time.

Moreover, putting aside the timeliness of this petition, the introduction of the hearsay evidence did not constitute reversible error. During the course of Monroe Hack's testimony, petitioner's counsel objected to Monroe's relating that his wife observed that he looked white as a ghost after his conference with petitioner about including Monroe in the counterfeiting venture, and this objection was sustained (R. 25). Thereafter, when other hearsay evidence was introduced and the court asked petitioner's counsel if he were not going to

[5] Rule 33: "* * * A motion for a new trial based on any other grounds [than newly discovered evidence] shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

object, counsel stated that he wanted the witness to "ramble on," and that he was "waiving" any objection (R. 26); that it did not make any difference if he waived objection or not, since he just wanted "to get through" (R. 28); and that he would "let [the witness] talk", and was waiving any objection (R. 35).

It is thus apparent that petitioner's counsel deliberately chose, as a matter of what he considered good trial strategy, to object to some hearsay evidence and to allow other hearsay to go in without objection. Most likely, petitioner's counsel reasoned that, by permitting the witness to "ramble on," counsel would enjoy a broader scope for damaging cross-examination and that the witness would volunteer much evidence which petitioner could refute effectively when he took the stand. In the circumstances here, counsel's deliberate waiver of objections to hearsay evidence as a matter of trial strategy does not establish that he was incompetent. Cf. *Felton* v. *United States,* 170 F. 2d 153, 154 (C. A. D. C.), certiorari denied, 335 U. S. 831; *Burton* v. *United States,* 151 F. 2d 17, 18 (C. A. D. C.), certiorari denied, 326 U. S. 789.[6]

4. Finally, petitioner contends for the first time, that since the same evidence was used for his con-

[6] Cases cited by petitioner (Pet. 26) as being in conflict with the decision below are inapposite. In *Beckett* v. *Hudspeth,* 131 F. 2d 195 (C.A. 10), it was held that the accused had not been denied effective assistance of counsel, where his attorney held three conferences with him before pleading guilty. In *Thomas* v. *District of Columbia,* 90 F. 2d 424 (C.A. D.C.) the decision turned primarily upon the non-judicial attitude of the trial judge in refusing to hear defense witnesses and denial of counsel's right to argue the case, rather than upon any lack of effective assistance of counsel.

viction under count one as for count two, there was double punishment in violation of the Fifth Amendment by reason of the consecutive sentences, and the sentence under count one should be set aside (Pet. 26-27). The offenses, however, under the substantive aider and abettor count, and the conspiracy count were separate and distinct, and punishable by separate sentences. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 643-644; *United States* v. *Crowe,* 188 F. 2d 209 (C. A. 7); *Colosacco* v. *United States,* 196 F. 2d 165, 168 (C. A. 10).

There is no conflict on this point with *Sealfon* v. *United States,* 332 U. S. 575 (see Pet. 27). There, the trial court had so instructed the jury on a conspiracy count that an acquittal on that count necessarily operated to prevent proof of certain facts essential to establish the substantive offense. It did not bar later prosecution on the substantive count. See 332 U. S. at 579-580.

CONCLUSION

The case was decided upon established legal principles, and no question of sufficient importance to merit further review by this Court is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 278226 4-13